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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 417

MICHAEL A. LEMONGELLO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

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MICHAEL A. LEMONGELLO,

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THE STATE OF NEW JERSEY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Michael A. Lemongello, prays that a writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in this case on June 30, 1967.

Opinion Below

There is no written opinion by the Supreme Court of New Jersey. There was, however, a *per curiam* opinion by the Appellate Division of the Superior Court of New Jersey. The latter opinion is printed in Appendix A hereto and the mandate on affirmance is printed in Appendix B. The

order of affirmance of the Supreme Court of New Jersey, without opinion and by way of a denial of a petition for certification, is appended hereto as Appendix C.

Jurisdiction

The order of the Supreme Court of New Jersey, here sought to be reviewed was dated June 30, 1967 (Appendix C hereto, *infra*). That order was a denial of a petition for certification and without opinion, affirmed the judgment of the Appellate Division of the Superior Court of New Jersey entered April 17, 1967 (Appendix B), which had affirmed a judgment of the Monmouth County Court, Criminal Division, upon a verdict convicting the within petitioner, Michael A. Lemongello, on one count of Possession of Lottery Slips, after a previous Mistrial.

The Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States, more particularly the Fifth Amendment (Double Jeopardy), Sixth Amendment (right to counsel) and Fourteenth Amendment (due process).

Questions Presented

1. is the Fifth Amendment's prohibition against placing an accused in double jeopardy applicable to state court prosecutions under the Due Process Clause of the Fourteenth Amendment?

2. Was the petitioner placed in double jeopardy at trial when the previous trial court declared a mistrial after the jury had been impaneled and testimony taken, upon the Motion of the Prosecutor, over the objection of the defendant, on the ground that Defense Counsel's conduct was prejudicing the defendant.

3. Was the defendant deprived of the Benefit of Counsel at the previous trial when the Court declared a Mistrial because of the alleged misconduct of Defense Counsel?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION—Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION—Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

UNITED STATES CONSTITUTION—Fourteenth Amendment

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due processes of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW JERSEY CONSTITUTION, 1947—Article I, Paragraph 11

"No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

The State Statute whose violation was charged in the indictment and upon which the defendant was convicted, is N.J.S.A. 2A:121-3, and which declares it to be illegal to be in Possession of Lottery Slips. There is no issue relating to this statute in this petition for certiorari, and the same is not printed herein.

Statement of the Case

On November 24, 1964, the defendant, Michael A. Lemongello, was indicted by the Monmouth County Grand Jury, in two counts. The First Count charged defendant with Making Book on Horses in violation of N.J.S. 2A:112-3, on October 12, 1964, and the Second Count charged defendant with violation of N.J.S. 2A:121-3 in that he had unlawful Possession of Lottery slips and papers on October 12, 1964.

The First Count of the Indictment (Making Book) was dismissed on Motion of the State after the Jury failed to agree in its verdict concerning it. At the same trial de-

fendant was convicted on the Second Count (Possession) before a Judge and Jury, and sentenced to Six Months in the County Jail and to pay a $500.00 fine. The defendant is free on bail pending appeal.

Before the Trial at which defendant was convicted of Possession (July 7, 1966) there had been a Trial started on June 10, 1965, which ended in a Mistrial upon Motion of the Prosecutor. The Motion was made on the ground that the Defense Counsel was guilty of Misconduct and of "deliberately obstructing an orderly trial". Counsel for Defendant opposed the Motion for and Declaration of the Mistrial. The transcript of that portion of the First trial, concerning the declaration of the Mistrial, is printed in Appendix D.

Before the Retrial, upon Motion of the defendant, Double Jeopardy was pleaded and the Court was moved to Dismiss the Indictment on the ground that the Declaration of a Mistrial on June 10, 1965, against the objection of the defendant, constituted a Trial and its result was tantamount to Acquittal. Defendant argued that there was no substantial basis for the declaration of the Mistrial as nothing bizarre or unusual had occurred, and because defendant had been prejudiced by such Mistrial and had been placed in Jeopardy thereby. The Motion was denied.

The defendant had moved for the dismissal of the Indictment on the ground that a new trial would place him in double jeopardy in violation of the Fifth Amendment to the United States Constitution. The Motion was denied in an unreported opinion, in which the Court (a different Judge) cited *Gori* v. *United States*, 367 U. S. at page 1523, in support of the trial judge's discretion to declare a mistrial where "counsel for defendant embarked upon a deliberate plan to interfere with the orderly procedure of this trial" and in "fairness to the defendant" a mistrial should have

been declared. At the same time the Judge ruling on the motion refused to commit himself on the proposition as to whether or not there was any factual support for the trial judge's finding of "misconduct" on the part of Defense Counsel, and cited Justice Douglas dissenting opinion in *Gori:* "The place where one comes out when faced with the problem of this case depends largely on where one starts."

The alleged misconduct of Defense Counsel consisted of an orderly series of objections to the attempt of the State to prove a confession without laying the proper foundation of Voluntariness.

The defendant had argued that there was no longer a distinction between "admissions against interest" and "confessions" in respect to the burden of proof on the part of the State to prove them Voluntary. Defendant's objection was overruled and a Police Officer testified to an Exhibit. While the Police Officer, the witness Manning, was looking at the exhibit which had been marked for Identification, Defense Counsel went to the Witness chair to also look at the Exhibit. The Prosecutor asked Defense Counsel to sit down. After the Prosecutor stated that the Exhibit was not in evidence the Court ordered Defense Counsel to take his seat at counsel table. The document was not exhibited to Defense Counsel. Defense Counsel argued that he had a right to look at the exhibit and was again admonished by the Court to sit down. Finally, after Defense Counsel had seated himself, he addressed the Court from his seat and the Court recessed the Jury. The Prosecutor moved for a Mistrial and this motion was granted on the ground that, in effect, Defense Counsel was representing his client prejudicially, or in any event, that the incident had prejudiced the defendant.

The case went on to Retrial on July 7, 1966, in the Monmouth County Court. During the trial, defendant applied to the Court for a Hearing on the issue of Voluntariness of the "admissions against interest of the defendant". This application was granted and a Hearing was held at which defendant testified in the absence of the Jury, but after the Court ruled the admissions were Voluntary, it refused to permit the same hearing with the defendant testifying, in the presence of the Jury, unless defendant exposed himself to cross-examination on the entire case. Defendant objected to this condition of the Court as violative of his rights under the Fifth Amendment not to incriminate himself, and that the Court had no right to ask him to waive such rights.

The re-trial ended in a disagreement by the jury on the First Count (Bookmaking) and conviction on the Second Count (Possession). The State moved the dismissal of the First Count of the Indictment and the defendant was sentenced to six months in the County Jail and a fine of $500.00 on the Second Count, for "Possession". Defendant appealed to the Appellate Division of the Superior Court of New Jersey, which affirmed the conviction on April 17, 1967. The opinion of this Court is attached hereto as Appendix A. A Petition to the New Jersey Supreme Court for certification to the Appellate Division, was filed. The Petition for Certification was denied by the New Jersey Supreme Court on June 30, 1967, and a copy of its Order of Denial is attached hereto as Appendix C.

The New Jersey Superior Court, Appellate Division in its opinion (Appendix A) affirmed the denial of defendant's motion for dismissal of the Indictment on the ground of Double Jeopardy, in a *per curiam* opinion, which stated that it was clear from the record "that the primary motive for the granting of the mistrial was the trial judge's solici-

tude for the defendant's interests". It cited *State* v. *Farmer*, 48 N. J. 145, 171 (1966) and also *Gori* v. *United States*, 367 U. S. 364, 81 S. Ct. 1523 (1961), as holding "A wide range of discretion is recognized in the trial judge, who has his finger on the pulse of the proceedings."

Reasons for Granting the Writ

I. This Court in *Cichos* v. *Indiana* granted *certiorari* on the same question presented herein. However, after hearing the matter, this Court did not reach or decide the question tendered by the petition for *certiorari* and the writ was dismissed as improvidently granted. 385 U. S. 76, 17 L. ed. 2d 175, 87 S. Ct. 271 (1966).

Prior to the decision in *Cichos* v. *Indiana*, this Court has had occasion to consider the question whether the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States. In *Palko* v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, Mr. Justice Cardozo perceived the principle in these terms: The Due Process Clause of the Fourteenth Amendment prohibited the States from enforcing their criminal laws at the cost of violating some fundamental precept of justice, of imposing a "hardship so acute and shocking that our polity will not endure it.

Thereafter, in *State of Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462-463, the case of an unsuccessful execution, Mr. Justice Reed, writing for himself, Chief Justice Vinson, Mr. Justice Black and Mr. Justice Jackson declared that "our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense," and concluded, *inter alia*, not that the Due Process Clause has no doube jeopardy content, but that there is "no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execu-

tion." Mr. Justice Frankfurter, concurring in the judgment to form the majority stated that the Due Process Clause viewed as prohibiting fundamentally unfair state procedures, had some double jeopardy content, while the dissenters did not concern themselves with double jeopardy, but only with the claim that a second attempt to execute the prisoner would be a cruel and unusual punishment. Then followed *Gryger* v. *Burke,* 334 U. S. 728, 732 (1948), where a unanimous Court held, without reserving the question of whether the Due Process Clause of the Fourteenth Amendment had any double jeopardy content, that a multiple offender statute does not subject "petitioner to double jeopardy," since the sentence as a multiple offender is not "viewed as either a new jeopardy or additional penalty for the earlier crimes."

This Court was not unanimous in *Brock* v. *State of North Carolina,* 344 U. S. 424, 73 S. Ct. 349 (1953), yet the difference arose not so much from the general proposition that the Due Process Clause places some limits on the power of a state to reprosecute, but from the application of this proposition to the particular reprosecution challenged—the State retried the petitioner after the first trial was halted and a mistrial declared because of the temporary unavailability of testimony by witnesses for the prosecution. The concurring Justice (Frankfurter, J.) and the dissenting Justices (Vinson, C.J. and Douglas, J.) embraced this general proposition, and although Mr. Justice Minton, writing for the Court, was less explicit, he did perceive the question presented (using the language of *Palko*), as whether "that kind of double jeopardy" was "a hardship so acute and shocking that our polity will not endure it." *Wade* v. *Hunter,* 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949), a case under the Double Jeopary Clause of the Fifth Amendment was used to justify a negative answer to this question in

Brock. Similarly in *Hoag* v. *State of New Jersey,* 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958) there was acknowledgment that certain state reprosecutions would be constitutionally impermissible. The petitioner was alleged to have robbed five persons on the same occasion. He was first tried and acquitted for robbing three of the victims; and the Supreme Court held that a second trial based on an indictment charging him with robbing the fourth victim was not an "impermissible use of multiple trials. Yet its premise was that some uses of multiple trials would be constitutionally impermissible. See 356 U. S. at 467-469, 78 S. Ct. at 833. See also *Ciucci* v. *State of Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983 (1958) fragmented prosecution for homicide.

In *Bartkus* v. *State of Illinois,* 359 U. S. 121, 79 S. Ct. 676 (1959), this Court apparently assumed that there is some double jeopardy content to the Fourteenth Amendment. A State reprosecution following an acquittal in a federal prosecution for the same conduct, robbing a federally insured savings and loan association, was held permissible only because it was viewed as a reprosecution by another sovereignty for a crime against it. See also *Abbate* v. *United States,* 359 U. S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959). The Court's opinion in *Bartkus,* written by Mr. Justice Frankfurter, contains abundant suggestions that if the successive prosecutions were both conducted by the same sovereignty, such as Illinois, the Due Process Clause of the Fourteenth Amendment does impose some restrictions on the power of a state to reprosecute an individual for the same crime, though we are told by Mr. Justice Frankfurter, that this proposition had been established more than thirty years prior: "[I]n *Palko,* the Court ruled that * * * at some point the cruelty of harassment by multiple prosecutions by a State would offend

due process." 359 U. S. at 127, 79 S. Ct. at 680, 3 L. Ed. 2d 684.

Although Mr. Justice Black concurred with the majority in *Cichos* v. *Indiana, supra,* he explicity stated that he adheres to his views in *Bartkus* v. *Illinois,* dissent, 359 U. S. 121, 150, 3 L. Ed. 684, 705 to the effect that the Fourteenth Amendment makes the doube jeopardy provision of the Fifth Amendment applicable to the States.

In the past, this Court has incorporated certain guarantees of the Bill of Rights into the Fourteenth Amendment, thereby making them applicable to the States. Mr. Justice Cardozzo in *Palko* v. *Connecticut,* 302 U. S. 319, 326, 82 L. Ed. 288-292 said that guarantees selected by the Court "have been taken over from the earlier Articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption." See, also, Brennan, The Bill of Rights and the States, 36 N. Y. U. Law Rev. 761 (1961); Henken, "Selective Incorporation" in the Fourteenth Amendment", 73 Yale L. J. 74 (1963).

This Court has heretofore held that other guarantees of the Bill of Rights to be absorbed into the Fourteenth Amendment—the First Amendment; See *e.g. New York Times* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710 (1964); the Fourth Amendment, *Mapp* v. *Ohio,* 367 U. S. 543, 81 S. Ct. 1684 (1961); *Ker* v. *California,* 374 U. S. 23, 83 St. Ct. 1623, 10 L. Ed. 2d 726 (1963); the just compensation, See *Chicago B. & Q. Railroad Company* v. *The City of Chicago,* 166 U. S. 226, 17 S. Ct. 581 (1897) and self-incrimination clauses of the Fifth Amendment, *Malloy* v. *Hogan,* 378 U. S. 1, 84 S. Ct. 1489 (1964); *Griffin* v. *California,* 380 U. S. 609, 85 S. Ct. 1229 (1965); The right to counsel, *Gideon* v. *Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963) and confrontation clauses of the Sixth Amendment, *Pointer* v. *Texas,* 380 U. S. 400, 85

S. Ct. 1065 (1965) and the Eighth Amendments prohibition against cruel and unusual punishments, *Robinson* v. *California*, 370 U. S. 660, 82 S. Ct. 1417 (1962).

The New Jersey Supreme Court in *State* v. *Farmer*, 48 N. J. 145, 168 (1966) cited by the Appellate Division (Appendix A), in its opinion, held that the United States Supreme Court has revealed a disposition "on the part of the court to regard protection of all the basic rights encompassed by the Fifth Amendment as the inescapable obligation of both State and Federal soverignties." And thereupon concludes that the "Double Jeopardy" provisions of the Fifth Amendment to the United States Constitution are binding on the States. It reviews all the United States Supreme Court decisions in this area to reach this decision but held that in view of a discretion still remaining in a Trial Judge under the Federal Law, a Mistrial to "favor" the defendant could be granted without giving rise to the defense of Double Jeopardy.

II. The decision of the Court below is believed to be erroneous and contrary to the decision of this Court in *Downum* v. *United States*, 372 U. S. 734, 83 S. Ct. 1033, 10 L. E. 2d 100 (1963). A comparison of the facts and rationale of *Downum* with those here reveals that the instant case requires the protection against double jeopardy more so than in *Downum*. In *Downum*, on the morning that the case was called both sides announced ready. A jury was selected, sworn and instructed to return at 2:00 P.M. When it returned, the Prosecutor asked that the jury be discharged because his key witness on two counts of the indictment was not present—a fact discovered by the Prosecutor only during noon recess. It was not contended that the failure to secure the attendance of this witness was in any way deliberate or based upon the Prosecutor's conclusion that the impaneled jury was likely to acquit. Instead, the "jury first

selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence." This Court held that *Downum* could not be reprosecuted, since, by virtue of prosecutorial neglect, he was denied his constitutional right to have the impaneled jury hear and decide his case. The Court said, "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion.' ". 372 U. S. at 378. The later case of *United States* v. *Tateo*, 377 U. S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964) affirms the holding of this Court in *Downum* v. *United States, supra,* and distinguished the facts as follows at page 467: "*Downum* v. *United States*, 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 is in no way inconsistent with permitting a retrial here. There the Court held that when a jury is discharged because the prosecution *is not ready to go forward with its case*, the accused may not then be tried before another jury. * * *"

III. The defendant was prejudiced by the mistrial and deprived of benefit of counsel.

Retrial following discharge of a jury is prohibited unless the mistrial was granted with defendant's consent, which is not present here, or out of manifest necessity. *Wade* v. *Hunter*, 336 U. S. 684, 93 L. Ed. 974. The courts have recognized necessity when there is a breakdown of judicial machinery, *Gori* v. *United States*, 367 U. S. 364, 372; when the first jury is hung, *United States* v. *Perez*, 22 U. S. (9 Wheat) 579; a juror is disqualified, *e.g. Simmons* v. *United States*, 142 U. S. 148; the trial judge dies, *Freeman* v. *United States*, 237 Fed. 815; or war closes the court, *Wade* v. *Hunter*, 336 U. S. 684. Other instances of imperious necessity are cited by Justice Douglas in his dissenting opinion in *Gori* v. *United States*, 367 U. S. at page 371.

In the instant case, the prosecution's motion for a mistrial and the granting thereof, by the Court, favored a prosecution in that it aborted a trial by a jury that was likely to acquit the accused. The Prosecutor could not contend with the objections of Defense Counsel. The Prosecutor and the court were hostile to Defense Counsel concerning his legitimate objections and conceived of them as "obstructive".

In *Gori (Gori* v. *U. S.,* 367 U. S. 364) the Court had declared a mistrial *sua sponte* to protect the defendant from prejudicial testimony elicited by the alleged misconduct of the District Attorney. The defendant's attorney did not object to the mistrial in *Gori.*

The court must exercise a sound discretion in the declaration of a mistrial. *United States* v. *Perez,* 9 Wheat 579, 580; 6 L. Ed. 165 (1824). In Footnote 3, of Justice Douglas' dissent, he cites the only available case on the question of a declaration of a mistrial for the alleged misconduct of a Defense Counsel (*Gori* v. *U. S., supra* 372):

> "The accused has also been discharged where the trial judge erred in his estimate of the prejudicial quality of the remarks made by counsel for the accused, Armentrout v. State, 214 Ind. 273, 15 N. E. 2d 363, ..."

Any condemnation of the conduct of Defense Counsel was arbitrary and unsupported factually. A defendant is deprived of the benefit of Counsel under the Sixth Amendment of the Constitution of the United States, if trivial cause can produce a mistrial.

The Court erred in its ruling that defense counsel would only be permitted to examine the document in question, after the prosecutor had completed his questioning.

The Court also erred when it ordered defense counsel to sit down. Defense counsel obtained no realistic opportunity to make timely objection.

It was the defendant's right to oppose the mistrial and insist on a trial before the jury already selected. Defense counsel was a better judge of th defendant's prospects in the trial because he knew more of the facts of the defense, including the availability of witnesses for defendant at the particular time.

The Mistrial (June 10, 1965) aborted the cross-examination of the State's witness, Officer Manning, before the defendant could fully make a full record of the circumstances under which defendant made admissions against interest. After the Mistrial, *Miranda* v. *Arizona* (384 U. S. 436) was decided (June 13, 1966) and upon the Trial (July 7, 1966) the witness Manning deviated from his previous testimony substantially, to fortify the Admissions against Interest of the Defendant as *Spontaneous*. The defendant was severely prejudiced by the loss of facts which would have been embraced by *Miranda*.

In *U. S.* v. *Tateo*, 377 U. S. 463, it was fundamentally alleged by defendant, that trial errors (not resolved by formal appeal) put him in jeopardy at his trial and deprived him of his jury trial. The Court divided 5 to 4 on this issue and Justice Goldberg, leading the dissent, recognized the realistic basis of the failure of defense counsel to request a mistrial even when the rulings of the Court have been erroneous up to the point of the declaration of the mistrial, when he stated:

> "Many juries acquit defendants after trials in which reversible error has been committed, and many experienced trial lawyers will forego a motion for a mistrial in favor of having his case decided by a jury." *U. S.* v. *Tateo, supra*, 474.

The events complained of by the Court were too trivial to warrant a declaration of a mistrial under all the circumstances. Defense counsel did not exceed the bounds of duty towards his client, under all the circumstances. The defendant has a constitutional right to be represented by counsel. Such a right can not be eroded indirectly by an arbitrary decision that counsel is representing his client prejudicially. The independence of the Bar, is a concept that should be fostered by the courts.

Physical presence of counsel is not enough. *Powell* v. *Alabama*, 287 U. S. 45, 71.

An attorney has a duty to perform.

> "He is merely carrying out what he is sworn to do under oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution." *Miranda* v. *Arizona*, 384 U. S. 436.

A careful analysis of the testimony and proceedings, will demonstrate that there was unnecessary hostility manifested by the prosecutor towards defense counsel. The prosecutor was annoyed by the content of defendant's objections on important issues, as they endangered the prosecutor's case from a legal standpoint. If the defense wanted a mistrial every time it encountered a hostile prosecutor, it would be engaged in a futile search, as it would have no assurance that the climate would improve at the next trial. Such hostility can even benefit the defendant and it is defense counsel who must evaluate the benefit.

An analysis of the entire transcript of the mistrial will demonstrate that defense counsel was sincerely trying to do his duty towards his client and the Court. There was

no disrespect to the Court intended, and any misunderstanding (that conceivably could have been basis for criticism of defense counsel) could have easily been corrected by the Court's instruction to the jury by way of remedy. Defense counsel's inquiry (outside of the presence of the jury) as to the rules of the Court is simply a reflection of the different way the jury was selected, the seating arrangement of counsel, and local procedures already witnessed in Monmouth County. This inquiry was made outside the presence of the jury to forfend anymore difficulty during the course of the trial. There are differences in rules (the application of rules) in various counties and States. Both the prosecutor and the Court misinterpreted a sincere effort to adjust to what ever local rules existed.

The unwillingness of the court to entertain the objections of Defense Counsel, and the conduct of the Prosecutor, reflected a fear that the jury was likely to acquit the defendant.

> "If there is any intimation in a case that prosecutorial or Judicial impropriety justifying a mistrial resulted from fear a fear that the jury was likely to acquit the accused, then the defendant will have suffered jeopardy."
>
> *U. S.* v. *Tateo,* 377 U. S. 463 (1964) page 468, Ftn. 3.

The declaration of a mistrial on such unsubstantial grounds as the "misconduct" of Defense Counsel, could abort any trial, and could abort the right to the benefit of Counsel of one's choice, at the whim of any prosecutor or court.

The prohibition is not against being twice punished, but against being twice put in jeopardy. *Untied States* v. *Ball,*

163 U. S. 662, 669, 41 L. Ed 300, 302, 16 S. Ct. 1192. The rationale of the doctrine of double jeopardy was expressed by the Court in *Green* v. *United States*, 355 U. S. 184, 187, 2 L. Ed. 199, 78 S. Ct. 22. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

It cannot be contended that the injury to petitioner was less substantial than the injury to *Downum*. Each was deprived of his "valued right to have his trial completed by a particular tribunal". *Wade* v. *Hunter, supra*. Petitioner was subjected to the taking of evidence; *Downum* was not. The Prosecutor's action was the producing cause of the mistrial.

IV. The retrial court committed reversible error, and abused its discretion, when it held that a defendant must waive his constitutional rights in order to be heard in a preliminary hearing in the presence of the jury, on the admissibility of a confession or admission. The retrial took place on July 9, 1966.

The Trial Court had held a hearing on the voluntariness of defendant's admissions and inculpatory statements, outside the presence of the jury. Defendant had demanded that the entire testimony, including defendant's, be heard in the presence of the jury but the Court denied this application on the ground that if defendant took the stand on a preliminary hearing in respect to the voluntariness of his confession or admissions, "he must subject himself to inquiry from the State on all pertinent areas in the case . . .

If you proposed to offer him as a witness in any respect, I will permit cross-examination in any area which is pertinent to the issues here." The defendant had argued that this exposure of defendant to cross-examination on the entire case, was not proper as a condition for a preliminary hearing before the jury on the question of Voluntariness of his Admissions before Trial as being violative of his rights under the Fifth Amendment to the United States Constitution, not to be compelled to testify against himself.

The Trial Court abused its discretion in ruling that a preliminary hearing could only take place before the jury on condition that defendant's testimony in such a hearing would expose him to full cross-examination on the entire case. This was a fanciful ground to rest discretion upon, and was an abuse of discretion resulting in manifest wrong and injury to defendant. The jury would thus be deprived of the right to hear all of the evidence on voluntariness, if in effect the defendant could not testify on the limited issue only. It was an abuse of discretion to arbitrarily eliminate the defendant as a witness on volutariness before the jury, by imposing the harsh condition that he must waive his rights under the Fifth Amendment, not to be compelled to testify against himself.

Malloy v. *Hogan,* 378 U. S. 1 (1964);
Rogers v. *Richmond,* 365 U. S. 534, 544 (1961);
Wan v. *United States,* 266 U. S. 1 (1924).

In prelminin.ry examination of admissibility of a confession, defendant has right to be heard without waiving any constitutional rights. *State* v. *Blouse,* 199 Ore. 676, 264 Pac. 2d 800.

We submit that the questions posed herein are of substantial constitutional dimensions meriting a determination

by this Court and that the New Jersey Supreme Court has decided a constitutional question not in accord with the applicable decisions of this Court.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully submitted that this petition be granted.

Respectfully submitted,

FREDERICK KLAESSIG,
Counsel for Petitioner.

APPENDIX A

Per Curiam Opinion of Superior Court of New Jersey, Appellate Division

(Filed—April 17, 1967.)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1257-65

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

MICHAEL A. LEMONGELLO,

Defendant-Appellant.

Argued March 20, 1967. Decided April 17, 1967.

Before JUDGES SULLIVAN, KOLOVSKY and CARTON.

On appeal from Monmouth County Court—Law Division.

Mr. Frederick Klaessig argued the cause for appellant.

Mr. Thomas L. Yaccarino, Assistant County Prosecutor, argued the cause for respondent (*Mr. Vincent P. Keuper,* Monmouth County Prosecutor, attorney).

Appendix A

PER CURIAM.

Defendant was convicted by a jury on the second count of a two-count indictment charging unlawful possession of lottery slips (N.J.S. 2A:121-3). The first count, charging bookmaking, was dismissed on motion by the State after the jury reported inability to agree on a verdict as to that count.

On this appeal defendant urges pretrial error in the refusal to quash the search warrant and to suppress evidence seized pursuant to it, and in the denial of his motion for dismissal of the indictment on the grounds of double jeopardy. He also asserts that the trial court committed reversible error in admitting defendant's alleged admission or confession into evidence and in determining that defendant must waive his constitutional right to remain silent if he testified in the presence of the jury on the admissibility of an alleged admission or confession.

Defendant moved before trial and at the trial to quash the search warrant as illegal and to suppress the evidence obtained through the search. Defendant's contention is that the warrant was illegally issued because it was based on suspicion alone and the facts in the supporting affidavit were insufficient.

A search warrant may not issue based solely upon uncorroborated hearsay information received from an informer. Where, however, the supporting affidavit presents a substantial basis for crediting that hearsay, the question of proof necessary to establish probable cause is satisfied. *Jones* v. *United States,* 362 U. S. 257 (1960); *Draper* v. *United States,* 358 U. S. 307 (1959). It is therefore necessary to review the contents of the affidavit to determine whether these requirements have been met.

Appendix A

The warrant directed the law enforcement officers to enter and search at night, premises known as number 10 Tallen Drive, Hazlet, Raritan Township, Monmouth County, consisting of a one-story, frame dwelling occupied by the defendant. The affidavit of Detective Manning, dated October 9, 1964, recited that information was supplied to him by a reliable informant who had personal knowledge and whose information had previously resulted in successful arrests. Informant advised that defendant was taking bets on the racing at Yonkers' Raceway every night between 6:30 P.M. and 8:30 P.M. and taking bets during the same hours on other sporting events over telephone 264-8422. The affiant stated that an independent check with the telephone company disclosed that telephone number was now listed in the name of one M. Hickey (defendant's brother-in-law) at that address, but was transferred to him from defendant's name on December 16, 1963, and that in December 1963 twenty-six calls and in January 1964 forty-two calls had been made from that number to the number of a man who had been arrested by the affiant for bookmaking and convicted in the Monmouth County Court. Further checks by the telephone company revealed an unusual number of calls from the same number to other places of suspected gambling operations.

The affiant further averred that he made an investigation and surveillance on four days in October 1964 between the hours of 6:00 P.M. and 8:00 P.M. at the address occupied by defendant and observed a car registered in defendant's name parked in front of 10 Tallen Drive and on one of the dates a car registered in the name of a known gambler suspected of bookmaking was parked near that address. He declared he had learned from investigation defendant had been twice previously arrested and charged with bookmaking.

Appendix A

We are satisfied that there was sufficient corroboration in the affidavit to justify a finding of probable cause by the judge who issued the warrant. The contents of the affidavit were adequate to make him aware of the underlying facts which would justify a prudent man in believing that an offense had been or was being committed. *State* v. *Macri*, 39 N. J. 250, 257 (1963).

Contrary to defendant's contention, the record disclosed that the search warrant was properly executed and at a time when it was expressly authorized. Nor is there any basis for the defendant's complaint about the use of the telephone company records as to the telephone calls.

Defendant's claim of double jeopardy is grounded on the declaration of a mistrial in the first trial before Judge Thomas J. Smith and a jury. Early in that trial, which began on June 10, 1965, the conduct of the attorney for the defendant had aroused the irritation of the trial judge. During the course of examination of one of the State's witnesses by the assistant prosecutor, defendant's attorney rushed up to the witness box from the counsel table attempting to interject himself between the prosecutor and the witness in order to see a paper which the prosecutor was exhibiting to the witness. When the judge directed the attorney to take his seat, the defense attorney made an objection to the court's addressing him in a loud voice. The jury was excused and a long colloquy ensued. The trial judge finally granted the mistrial, stating that he did so out of consideration of fairness to the defendant. He concluded that the emotional outburst which took place might engender an adverse reaction by the jury and should not be visited on the defendant.

Appendix A

It clearly appears from the record that the primary motive for the granting of the mistrial was the trial judge's solicitude for the defendant's interests. In his judgment the conditions of the trial persuaded him that the ends of justice for this defendant could not be achieved without aborting the trial. These circumstances in no way bespoke oppressive conduct by the prosecutor or an effort to aid the prosecution. "A wide range of discretion is recognized in the trial judge, who has his finger on the pulse of the proceedings." *State* v. *Farmer*, 48 N. J. 145, 171 (1966). See also *Gori* v. *United States*, 367 U. S. 364, 81 S. Ct. 1523 (1961). Under the circumstances presented, we are not persuaded that that discretion was abused.

The next point urged by defendant is that the trial court erred in admitting defendant's statements into evidence. These statements were made when the police entered defendant's house pursuant to the search warrant and found him sitting at a desk in front of a telephone. A reading of the record satisfies us that the statements in question were spontaneously made by defendant incident to the arrival of the police. As such they were admissible without a determination as to voluntariness.

We perceive no merit in any other point urged by defendant.

Affirmed.

APPENDIX B

Mandate on Affirmance of the Superior Court of New Jersey, Appellate Division

(Filed—April 17, 1967.)

This cause having been duly argued before this Court by Frederick Klaessig, counsel for the appellant and Thomas L. Yaccarino, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Monmouth County Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Monmouth County Court —Law Division to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 17th day of April, 1967.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

APPENDIX C

Order of the Supreme Court of New Jersey, Denying Petition for Certification

(Filed—June 30, 1967.)

SUPREME COURT OF NEW JERSEY
C-224 SEPTEMBER TERM 1966

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

MICHAEL A. LEMONGELLO,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 30th day of June, 1967.

A true copy

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX D

Excerpt from Testimony at First Trial June 10, 1965 Which Resulted in a Mistrial

STATE OF NEW JERSEY
MONMOUTH COUNTY—CRIMINAL DIVISION
IND. 105-64—CASE NO. 26822

STATE OF NEW JERSEY,

vs.

MICHAEL A. LEMONGELLO,

Defendant.

Freehold, New Jersey
June 10th, 1965

Before:

HONORABLE THOMAS J. SMITH, J.C.C.
and a Jury.

Appearances:

JOHN APPLEGATE, ESQ.
Assistant Prosecutor

FREDERICK KLAESSIG, ESQ.
For the defendant.

ARTHUR SUTTON CSR
Official Stenographic Reporter

• • •

Appendix D

(27)* * * * going to testify to and then rule, one, is the defendant voluntarily answering on the level of no coerced confession and then number two, is the testimony admissible on any basis because these constitutional provisions have been violated and which constitutional provisions are now imposed upon the State in the Fourteenth Amendment by the latest decisions. This is my opinion.

The Court: Well, the case you referred to doesn't exactly stand for the proposition the way you make it out. It simply holds that a voluntary confession made by Russo without the benefit of counsel and without being warned that he could remain silent would not be admissible. We have something different here. At this point the Court has no way of knowing, except I would suspect from what little I have heard, that this is not a statement in the nature of a confession. The witness is probably going to testify to a conversation with the defendant and he is going to repeat what the defendant said to him that might be an admission. That is a far cry from a statement of confession.

Please don't interrupt.

Mr. Klaessig: I am not going to interrupt you.

The Court: You break the Court's chain of thought.

(28) So I don't see the similarity here between the case you cite and it gets to be a little ridiculous and absurd if the police authorities upon application of a search warrant have to call up the defendant and say get yourself a lawyer we are coming over there and we want to talk to you. This idea can be

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

carried out to absurd proportions. Further than that even if the case you cite was applicable to our facts, our Supreme Court has made a distinction in the *Escobedo* case and that is the law we are following at the moment.

But I think it really is all beside the point because I don't think we have a statement in the nature of a confession where a defendant reveals and admits the entire crime, with all the elements. An admission may be only one part of it. An admission may say yes, I was there, but it doesn't say I was there and did the crime.

Mr. Klaessig: I answer one point purely out of intellectual—

The Court: It becomes an interpretation of semantics. But I will indulge you for—

Mr. Klaessig: —we are all lawyers. The United States Supreme Court has held in 348 U. S., *Opper* v. *United States* that confessions cannot be distinguished (29) from admissions, exculpatory statements or non-exculpatory statements, they are in the same category.

The Court: Reasonably so, but within limits and there is quite a distinction, if you examine the law, you will see the distinction. You have made the objection and the Court has overruled it. Is there anything else you want to say out of the presence of the jury on this record?

Mr. Klaessig: No, your Honor.

The Court: Now, it is five minutes to twelve. Let's get back to the trial. Bring the jury back please.

(Jury in the box.)

The Court: All right, gentlemen, proceed.

Appendix D

ANDREW B. MANNING, having been previously sworn, resumed, and testified further as follows:

Direct examination by Mr. Applegate (continued):

Q. Detective Manning, I think I asked you prior, after you read the search warrant to the defendant, as you testified, he was in his living room, I think you said? A. In the dining room, sir.

Q. In the dining room. And will you tell us what the defendant said to you? (30) A. Yes, sir. I said to him that we have a search warrant, and his two children and his wife were present and we didn't want to embarrass him any more than he was. He said though, it's all right here, right in front of me. All the work is here. But if there hadn't been a game tonight you wouldn't have gotten this.

Q. I see. And what was this defendant referring to? A. The—

Mr. Klaessig: I object to the question. This calls for an opinion of the witness.

The Court: Sustained. Rephrase the question.

Mr. Applegate: Withdraw it. May I have this marked for identification?

The Court: Yes, it may be marked for identification.

(Armstrong Sheet marked Exhibit S-1 for identification.)

Q. Detective Manning, I show you Exhibit S-1 for identification and I ask you if you have seen that prior to today? A. Yes, sir, I have.

Q. I ask you if you have seen it—

Mr. Applegate: Will counsel please sit down?

Appendix D

Mr. Klaessig: Your Honor, I am allowed to look at an exhibit if the witness—

Mr. Applegate: That is not in evidence.

(31) The Court: Mr. Klaessig, take your seat at counsel table.

Mr. Klaessig: Your Honor, may I argue—

The Court: Take your seat at counsel table.

Mr. Klaessig: Your Honor I'd like to—

The Court: Mr. Klaessig, please.

Mr. Klaessig: I want to note an objection on the record.

The Court: You may do that but you will have to keep from interrupting the Court constantly. I ask you now to take your seat.

Mr. Klaessig: May I now rise to make an objection?

The Court: Not at this point. Let counselor finish his question.

Mr. Klaessig: I do not like to address the Court sitting in a chair.

The Court: Just a minute. Excuse the jury. You may step down, sir.

(Jury excused.)

The Court: Mr. Klaessig, I rarely, if ever, have to do what I did with you.

Mr. Klaessig: Your Honor, in my whole life no Judge ever told me to sit down.

The Court: Just a minute, please. You seem to (32) have a habit of keeping on interrupting the Court all the time. I told you that I rarely, if ever, did anything like that but your conduct required it and compelled me to do it. Now, this is a Court of law and you are an officer of the Court and you must

have great respect for the Court, far greater than most people—

Mr. Klaessig: I do, sir. I do, sir.

The Court: —otherwise you destroy our whole system. And I don't want to affect your client's rights and interests either, which are paramount at the moment. But I am going to require you to give the utmost respect to this Court and stand silent. I asked you to sit down because you took a position next to the witness, the Prosecutor was standing at his right and handed him a paper and you rushed over from counsel table which is six feet away from the chair and tried to get in between them. Now that kind of conduct on the part of the attorney doesn't help any—it doesn't produce any help in well maintaining the Court so that we get all the facts in an orderly manner. I am sure you may have done it because of your excitement having just finished your motion and argument on the other objection concerning the confession and I realize that you may be (33) were upset and I hope that you are not going to make me take any steps that would affect you. I am going to charge it off to your excitement but I am going to ask you please do not do anything further that is going to require me to admonish you.

Mr. Klaessig: Please, may I answer you?

The Court: Now speak.

Mr. Klaessig: Please do not write this off to excitement. I am far too mature and sophisticated a person to have his written off to excitement. When I want to argue with your Honor on this very level and I want to argue with your Honor as I am doing

now it is fundamental when there is a witness of the State who is testifying against the defendant and he has any sort of paper in front of him in order to intelligently follow the question of the Prosecutor I must make observation of the paper, I must know what the paper is to which the witness is addressing his attention, I have a right to do that. I am sure Mr. Applegate did not object that I was discourteous because I had no intention to be discourteous. He was objecting because I was standing up at the witness stand at the time. Isn't that a fair statement, Mr. Applegate?

Mr. Applegate: No.

(34) The Court: Let's not make this a debating society.

Mr. Klaessig: I just want to make clear my position and I realize I have the utmost respect for this Court. I hope your Honor realizes that, but I still have this obligation to follow the case of my client and I sincerely went up there to see what the paper was. I didn't mean to be discourteous to the Prosecutor.

On the second point, after your Honor told me to sit down, I have never been told to sit down by any Judge, because I know the law, I know the necessity for discipline in court, I know that a Court must be respected to run an efficient court and I have no intentions in any way, it only hurts my client, as you said, and this is fundamental Constitutional law, your Honor must show respect to the counsel for the defendant.

The Court: Well, I am satisfied that every one in this courtroom including at least one member of

the Bar not participating in the case could not say otherwise. Let's not put in the record anything that is wrong. Let's keep the record correct.

Mr. Klaessig: After your Honor told me to sit down I wanted to object to your Honor's addressing me (35) in a loud voice—

The Court: You made another mistake. You used the word "loud voice,"—the only loud voice that is going on here was your voice. Your voice now is several octaves lower. You are now conducting yourself as you should. Let us terminate the argument. As long as you are in this court, when I instruct you to sit down, you sit down.

Mr. Klaessig: May I finish the point for the record?

The Court: If it goes to an objection.

Mr. Klaessig: It goes to an objection. My objection was going to be to your Honor's conduct because when your Honor tries to degrade counsel for the defendant you are depriving him of the benefit of counsel. This is a fundamental Constitutional right.

The Court: You made another mistake. I am not degrading you but I am going to require you to conduct yourself in a proper manner so that everyone will have respect and regard for this Court and our whole system.

When you have an objection you do it quietly.

Mr. Klaessig: I will do that, your Honor.

The Court: And another thing, I don't know what (36) your practice has been before but you are not going to rush up to a witness and look at the paper because another attorney handed it to him. You do it

properly. When he is finished your adversary will give you the paper and you will have an opportunity to examine it and we will have it all in the record.

Mr. Klaessig: I will do that, your Honor, I only wish your Honor—I am trying to understand what your rules really are in this court.

The Court: My rules are the rules of practice as promulgated by the Supreme Court, the same as they are in any other County and I wish you wouldn't keep on making statements of that nature.

Mr. Klaessig: I am not being disrespectful. I am not criticizing you. You misunderstand me. I mean by the rules—

The Court: Of course the cold record won't show the tone of voice or how you are saying it.

Mr. Applegate: Before the jury is brought back may I address the Court?

The Court: Yes.

Mr. Applegate: As the person who has been the Prosecutor in this court for ten years or more I feel from the attitude of counsel that he is deliberately trying to incite and to annoy and interfere with the (37) orderly presentation of testimony and evidence on behalf of the State. I feel under the circumstances, your Honor, and I leave this entirely up to your Honor, that with this feeling in mind perhaps I should withdraw from this case and let another assistant try it.

Mr. Klaessig: Your Honor, I am not—your Honor, do you believe that I am trying to interfere with the orderly presentation of Mr. Applegate's case? Have I done anything other than a legitimate attorney would do? I think it is a very unfair statement, your

Honor. I am really offended. That is unfair. I have done nothing. Anything that you have done which could be misinterpreted by you I think should be credited with sincerity. Your Honor, I appeal to your Honor to not consider that for a moment.

The Court: Mr. Prosecutor?

Mr. Applegate: I want to go one step further, under the circumstances I am moving for a mistrial in this case, Judge.

The Court: Well, that motion should take precedence over everything that has been said here. There isn't any question in this Court's mind that counsel for the defendant embarked upon a deliberate (38) plan to interfere with the orderly procedure of this trial and in view of the fact that so much of it happened before the jury, in fairness to the defendant who is having his day in court and these actions of counsel, or the emotions that might be engendered by the participants and the jury shouldn't be visited upon him. The motion for a mistrial is granted and I will deal with counsel later, counsel meaning Mr. Klaessig.

The jury will be brought back and excused.

(Jury in the box.)

The Court: Members of the jury, out of your presence matters of law and other matters were discussed and the Court has determined upon them and it makes unnecessary any further duties on your part in this case.

Mr. Foreman, I ask you to rise and step out of the box.

A mistrial will be declared in this matter.

Even though it is without the consent of the de-

fendant the Court feels that under the circumstances present here and the facts here it had no alternative and that that matter should be given consideration in the event of any other plea that might be made by the defendant at a subsequent time.

(39) The jury is excused. Return to the General Jury Panel Room.

(Jury excused.)

The Court: I will ask you to remain, counsel. The Court is going to take a short recess and I will ask you to remain in court.

Mr. Klaessig: May I address the Court and say something in response? I strongly object to the declaration of a mistrial and may I state that for the record?

The Court: Surely.

Mr. Klaessig: I object that there was no basis for the declaration of the mistrial. There was nothing that was said in court that was prejudicial to this defendant in the presence of the jury and whatever there was I never had an opportunity to object to it. I strongly object to the declaration of a mistrial.

The Court: I think if you look at the record there is an objection to it. You seem to be so excited you don't seem to remember what you said. That will be the end of it. I will ask you to remain in the courtroom while I take a short recess.

(Short recess.)

(Excused for lunch at 1:00 P.M.)

Appendix D

(40) Afternoon Session

The Court: Gentlemen, this is the case of State versus Lemongello. Mr. Klaessig, I believe your course of conduct this morning at trial constituted interference with the proper conduct and progress of the trial. It bordered on the contumacious. However, before determining the matter I am going to review the transcript and you will later be notified as to what action the Court shall take.

Mr. Clerk, I will return the indictments and the papers to you.

Now Mr. Prosecutor, do we have something further on the calendar now?

Mr. Applegate: Not at this time.

Mr. Klaessig: Your Honor, will there be a hearing? Will I have a hearing on this matter?

The Court: There is nothing that you are able to say at this time. At an appropriate time, if necessary, you will be given every opportunity for a hearing.

Mr. Klaessig: Thank you.

The Court: We will adjourn at this time and get caught up with our office work. Thank you.

(Whereupon Court was adjourned at 2:12 P.M.)